

The Standard of Appellate Review: *High Hurdles to Right Wrongs*

by Igor Ellyn, QC, CS and Evelyn Perez Youssoufian
ELLYN LAW LLP Business Litigation and Arbitration Lawyers,
Toronto, Ontario, Canada www.ellynlaw.com

This is an excerpt of a paper to be published in the Summer 2009 issue of *The Litigator*, the Journal of the Ontario Trial. The statements in this article are for information only and are not intended as legal advice. © 2009 Igor Ellyn QC and Evelyn Perez Youssoufian. No part of this paper may be reproduced.

Assessing the prospects of success on appeal and winning on appeal are among the most difficult aspects of an advocate's role. Losing party's counsel is confronted with human and analytical challenges which can be more complicated than the events which led to the unsatisfactory trial judgment, jury verdict, arbitral award or tribunal decision. Winning counsel has to deal with the possibility of reversal.

The trial judge has handed down a judgment. The jury has reached its verdict. The arbitral tribunal has made its award. The administrative board has handed down its decision. Now, you, the trial counsel, confront the most difficult part of your service to your client.

Whether you are revelling in the euphoria of victory or suffering the agony of defeat, your task is no easier. You have to explain to your client if the judge, jury, arbitrator or board was right and what threshold must be met on appeal to reverse or preserve the result.¹ More often than not, the prospects of success on appeal do not lend themselves to a black and white response. There will be several issues and multiple parties; there may be claims and counterclaims and the appeal prospects of each may differ radically. Moreover, the issues of fact and law may lend themselves to varying educated views.

When you suffer the misfortune of losing at trial --- and all the best advocates have been there more than once --- your task is also complicated by human factors. You likely recommended that the case go to trial and oversaw rejection of the last round of settlement negotiations. You had a strong theory of

your case and a clear path to a successful result. You marshalled the best evidence. You prepared the evidence of each witness meticulously. Your retained competent experts, whose reports and evidence were excellent. You made a "winning argument" and as counsel, you were dazzling in the courtroom.

Now you have a client who has paid you tens of thousands of dollars in legal fees saying, "What do you mean, 'we lost'? How could *you* lose when you told me we had such a good case?" Ah, the joys of being a litigation lawyer.

This article is limited to civil appeals from trials or hearings on the merits. Due to space limitations, appeals from arbitral awards, administrative tribunals and certifications in class proceedings are not addressed [except in the endnote which refers to recent jurisprudential developments].²

Within the scope of this article, the role of appellate courts is to correct errors by trial judges.³ However, as Richard C.J. observed, "In the absence of any statutory direction, it is not the role of appellate courts to rehear or retry cases".⁴

Identifying the nature of the trial judge's errors is the first task. McLachlin CJC recently noted that "[d]oubt as to the soundness of the trial judge's findings of fact is not a recognized ground of appellate intervention."⁵ You have to go further to show *how and why* the trial judge was wrong. The appellate court expects counsel to articulate the error precisely.

The jurisdiction of Ontario's appellate courts, the Court of Appeal and the Divisional Court, is set out in

sections 6 and 17 of the *Courts of Justice Act* respectively.⁶ Rule 61 of the *Rules of Civil Procedure* and several lengthy Practice Directions⁷ set out the documents to be filed and procedure to be followed. However, none of these statutes or rules indicate the standard that must be met to succeed in the appellate court.⁸ The answers are found in the jurisprudence.

The Federal Court has the jurisdiction to hear all appeals from federal boards, commissions and tribunals other than those listed in section 28 of the *Federal Court Act*, and unless an Act of Parliament expressly provides otherwise,⁹ and of course, appeals from final judgments of the Federal Court and the Tax Court of Canada.¹⁰ Again, neither the Act nor the Rules of the Federal Court of Appeal set out the standard of review.

The standard of appellate review is found in the jurisprudence and can be summarized into four categories as follows:¹¹

| <i>Nature of trial judge's error</i> | <i>Standard of appellate review</i> |
|--------------------------------------|--|
| Question of law | Correctness |
| Question of fact | Palpable and overriding error |
| Factual inference | Palpable and overriding error |
| Mixed question of fact and law | On a spectrum between correctness and palpable and overriding error. Where questions of fact and law are inextricable intertwined, the trial judge's finding is entitled to deference. ¹² |

Appellate scrutiny determines whether inferences drawn by the judge are “reasonably supported by the evidence”. If the facts or inferences drawn by the trial judge are reasonably supported by the evidence, the appellate court cannot reweigh the evidence by substituting, for the reasonable inference preferred by the trial judge, an equally, or even more persuasive inference of its own. Appellate courts not only may — but must — set aside all palpable and overriding errors of fact shown to have been made at trial. This applies no less to inferences than to findings of “primary” facts, or facts proved by direct evidence.¹³

What makes standards of appellate review so difficult is that while judges may identify neat categories of judicial errors, putting a particularly fact, inference or interpretation into the right pigeon hole is more trying. Indeed, there is room for serious disagreement even among the best legal minds.

In an enlightening article written before his appointment to the Superior Court of Justice, Justice Paul Perell discusses the robust disagreement between the majority and minority in the Supreme Court of Canada in *Housen v. Nikolaisen*, which has ironically turned out to be the leading case on standard of appellate review in Canada:¹⁴

Both the majority and the minority . . . purported to apply the established case law about appellate review and each side robustly accused the other of not understanding or properly applying the law. The tone of all the judgments is tough and direct. Iacobucci and Major J.J.’s first statement was that it should be unnecessary to state the proposition that a court of appeal should not interfere with a trial judge’s reasons unless there is a palpable and overriding error. They characterized Bastarache J.’s discussion of the trial judge’s treatment of the municipality’s duty of care as an “unjustified intrusion” and an “unjustified interference”. For his part, Bastarache J. rebuffed the majority’s criticism that he applied a lower standard than the palpably wrong standard to be used when reviewing a trial judge’s factual inferences, and he stated that the

majority had drawn merely a semantic distinction.

Errors on Questions of Fact

Two types of errors may arise from the trial judge’s fact-finding at trial, namely, (1) a finding of fact or an inference which is not reasonably supported by any evidence; and (2) a “processing error”.¹⁵

The trial judge’s finding of fact are entitled to deference and are not to be overturned except in the case of palpable and overriding error, or its “functional equivalents”, such as where the trial judge’s finding was “clearly wrong”, “unreasonable”, “not reasonably supported by the evidence”, and “plainly and blatantly wrong”.¹⁶

The New Oxford Dictionary of English (1998) defines “palpable” as “clear to the mind or plain to see”.¹⁷ To be overriding, a palpable error must discredit the result.¹⁸ Where the evidence is capable of supporting the trial judge’s findings, an appellate court will not intervene.¹⁹

As Justice Perell explains, the concept of deference to the findings made by the trial judge is important. By setting the bar for reversal of an error of fact or an inference from the fact as high as palpable and overriding error, the appellate courts recognize that trial judges are presumed to be competent and are in a better position to make findings than the appellate court can be.²⁰

An appellate court cannot ignore the trial judge’s findings of fact. It must accept each and every finding of fact unless it is tainted by a palpable and overriding error.²¹ Appellate intervention will only be warranted where the appellate court is satisfied that an impugned finding is unreasonable or unsupported by the evidence and that it affected the result of the trial.²² Put another way, the appeal court must be persuaded that but for the trial judge’s error, the outcome would have been otherwise.

Errors on Inferences of Fact

Inferences are the conclusions a trial judge draws from the facts adduced in evidence. The standard of review for inferences is also palpable and overriding

error. It is not enough that the appellate court disagrees with the inference or would assign different weight. It must also be clearly unreasonable.²³

In *Housen v. Nikolaisen*, *supra*.²⁴, the court was unanimous that inferences of fact may be set aside if they are “clearly wrong”. “Clearly wrong” and “palpable and overriding” encapsulate the same principle: an appellate court will not interfere with the trial judge’s findings of fact unless it can plainly identify the imputed error and that error is shown to have affected the result. The test is met as well where the trial judge’s findings of fact can properly be characterized as “unreasonable” or “unsupported by the evidence”.²⁵

Processing Errors

A “processing error” arises when a trial judge fails to appreciate the evidence relevant to a factual issue, either by disregarding or misapprehending it. When an appellate court finds such an error, it must first determine the effect of that error on the trial judge’s reasoning. A processing error warrants appellate intervention only if it taints that part of the trial judge’s reasoning process that was essential to the challenged finding of fact.²⁶

A palpable and overriding processing error occurs when a trial judge makes a finding of fact in the absence of any evidence.²⁷ A judge’s failure to consider relevant evidence can amount to a reversible error if the evidence was potentially significant to a material finding of fact, but the judge’s failure to refer to some evidence in the reasons is not a failure to consider it. Reasons for judgment need not be exhaustive notes of the trial itself. The appellant must point to a specific error on the trial record, usually in the reasons, which justifies the conclusion that the trial judge failed to consider certain evidence.²⁸

If an overview of the trial judge’s reasons demonstrates a strong command of the trial record and a careful analysis of evidence leading to detailed findings of fact, leaving no doubt that the trial judge understood the record, appreciated the contentious factual issues, and understood the positions of the parties and the evidence they relied on, it will be

difficult to persuade the Court of Appeal that the failure to refer to a specific piece of evidence amounts to a failure to consider that evidence.²⁹

Where the trial judge fails to make findings of fact essential to the ultimate determination of the issues in dispute, a reversible processing error occurs.³⁰ However, the appeal court must be satisfied that the error occurred and that it was palpable and overriding.³¹

Errors on Questions of Law

The deference given to the trial judge's fact-finding does not extend to errors in interpretation of law.. Appellate courts analyze questions of law for correctness. On a pure question of law, an appellate court is free to replace the opinion of the trial judge with its own.³² Because pure questions of law attract the lowest standard of appellate, it is desirable but not always possible to characterize the trial judge's error as a question of law or as primary a question of law.

An appellate court will not intervene with an exercise of judicial discretion unless the judge erred in principle or the exercise of discretion was unreasonable in the sense that no weight or insufficient weight has been given to relevant considerations.³³

Errors on questions of mixed fact and law

A mixed question of fact and law arises when the judge applies a legal standard to a set of facts. This differs from factual findings or inferences which require the judge to draw inferences or conclusions from facts.³⁴

Where the legal principle is not readily extricable, then the matter is one of "mixed law and fact" and is subject to a more stringent standard of appellate review, namely palpable and overriding error.³⁵ Similarly, where the trial judge has considered all the necessary evidence but comes to the wrong conclusion, this amounts to an error of mixed law and fact and is subject to a more stringent standard of review.³⁶

However, where a trial judge's erroneous finding of negligence rests on an incorrect statement of the legal standard, an error of law results and the standard of correctness applies.³⁷

A trial judge's finding of negligence involves application of a legal standard to a set of facts and thus, is a question of mixed fact and law. The standard of review on errors of mixed fact and law lie along a spectrum between correctness and overriding error.³⁸ Appellate courts will be cautious in finding that a trial judge erred in law in the determination of negligence, as it is often difficult to separate the legal issues from the factual issues. Where the legal principle is not readily extricable, then the matter is one of "mixed law and fact" and is subject to a more stringent standard.³⁹

Jury Verdict Appeals

Civil jury trials create three types of appealable errors: (1) the erroneous discharge of the jury; (2) an erroneous charge or instructions; and (3) erroneous findings of the jury.

Discharging a Jury

Trial by jury is a statutory right which should not be voided except for substantial reasons.⁴⁰ Discharging a jury is an exercise of discretion for which the trial judge is entitled to substantial deference. However, an appellate court may intervene where that exercise has been carried out arbitrarily, capriciously or on wrong or inapplicable principles.⁴¹

Where a judge discharges the jury on the basis of prejudicial effect, the appeal court will intervene unless the judge has first attempted to relieve prejudice.⁴²

Appeal of Judge's charge to the jury

Where jury directions involve points of law, the standard of review is one of correctness, but the misdirection or non-direction must be material to the jury's decision. The key question is whether the trial judge's instructions provided the jury with sufficient guidance on the applicable law to enable them to understand it.⁴³ The appellate court will not interfere with a jury verdict based on inadequate instructions unless a substantial wrong or miscarriage of justice has been caused.⁴⁴

Moreover, if no objection was taken at trial, the appeal court is unlikely to intervene.⁴⁵

Appeal from the Jury's Verdict

Jury verdicts are tested against a reasonableness standard.⁴⁶ An appellate court will not set aside a jury verdict against the weight of evidence unless the Court of Appeal is satisfied that it is so plainly unreasonable and unjust that no jury reviewing the evidence as a whole and acting judicially could have reached it.⁴⁷ If the appellate court that finds there was no evidence supporting a particular verdict, it will set it aside.⁴⁸

In a negligence action, the standard of palpable and overriding error applies to findings of negligence by jury, unless the findings rest on an incorrect statement of the applicable standard of care, a failure to consider a required element of a legal test or a similar error in principle.⁴⁹ Where the issue on appeal involves the trial judge's interpretation of the evidence as a whole, it should not be overturned absent palpable and overriding error.⁵⁰

Further, the apportionment of liability in a negligence case is primarily the function of the trier of fact. Therefore, the appellate court will not interfere with the apportionment of liability unless there is a demonstrable error in the judge's appreciation of the facts or applicable legal principles.⁵¹

Conclusion

Even if counsel believes that the trial judge got it wrong, the prospect of succeeding on appeal is an uphill battle. The appellate court will usually defer to the trial judge except where the trial judge was clearly wrong on questions of fact or on mixed questions of fact and law or decided the case in the absence of any evidence of a particular issue. Even though the palpable and overriding standard applies to all factual errors, it may be easier to attack a processing error than inference error.

On questions of law, there is no deference to the trial judge except in the exercise of discretion. If the trial judge interpreted the law incorrectly, the appellate court will correct the error.

Appellate courts reverse trial judges nearly every day. The appeal court is more likely to intervene in a case where counsel demonstrates a sound understanding of the standards of appellate review

and clearly connects the trial judge's specific errors of fact and law to the applicable standard.⁵²



Igor Ellyn, QC, CS is the senior partner of ELLYN LAW LLP Business Litigation & Arbitration Lawyers, a Toronto law firm specializing in business dispute resolution and international judgment and arbitral award enforcement. He is a Specialist in Civil Litigation and a past president of the Ontario Bar Association.



Evelyn Perez Youssoufian is a commercial litigation lawyer at ELLYN LAW LLP. She has practiced law since 2005 and is an LL.B./JD graduate of the Faculty of Law, Univ. of Windsor and Univ. of Detroit Mercy.

Visit ELLYN LAW LLP online for more information: www.ellynlaw.com.

© Igor Ellyn, QC, CS and Evelyn Perez Youssoufian, March 2009

¹ Clients typically believe that “the client wins” and “the lawyer loses” but that is an aspect of the standard appellate review which is happily beyond the scope of this paper.

² *New Brunswick (Board of Management) v. Dunsmuir*, [2008] 1 SCR 190 at para. 45, which discusses the standard of appellate review in decisions of administrative board, commission or other tribunal. The matter is further discussed in *Canada (Citizenship and Immigration) v. Khosa* 2009 SCC 12. As to appeals from certification or non-certification of class proceedings, see *Cassano v. The Toronto-Dominion Bank*, 2007 ONCA 781 (CanLII) at paras. 23-24; *Sauer v. Canada (Agriculture)*, 2009 CanLII 2924 (ON S.C.D.C.) per J. Wilson J. Div. Ct. At para. 74; *Heward v. Eli Lilly & Company*, 2008 CanLII 32303 (ON S.C.D.C.) per Cumming J. Div. Ct. at para. 17-19; *Markson v. MBNA Canada Bank* 2007 ONCA 334 (CanLII), (2007), 85 OR (3d) 321 at para. 33 (C.A.), leave to appeal to S.C.C. requested, [2007] S.C.C.A. No. 346;

³ It is beyond the scope of this article to consider the policy and constitutional roles of the Supreme Court of Canada, nor the policy role of the Ontario Court of Appeal.

⁴ *Aventis Pharma Inc. v. Apotex Pharma Inc.* 2006 FCA 64 (CanLII) at para. 22.

⁵ *H.L. v. Canada (AG)*, 2005 SCC 25 (CanLII), at para. 16.

⁶ R.S.O. 1990. c. C.43. The jurisdiction of the Div. Court includes appeals to a single judge from decisions of the Small Claims Court which we have not covered in this paper. Small Claims Court appeals may have an even greater significance when the jurisdiction is increased to \$25,000 in 2010. The jurisdiction of the Supreme Court of Canada is set out in the Supreme Court Act, R.S.C. 1985, c. S-26. The procedure is set out in n Supreme Court of Canada Rules (SOR/2002-156). The standard of review in the Supreme Court is also set out in jurisprudence.

⁷ Ontario Court of Appeal website: www.ontariocourts.on.ca/coa/en/notices/pd/civil2003.htm; and Divisional Court website: www.ontariocourts.on.ca/scj/en/notices/#civ.

⁸ Section 119 of the *Courts of Justice Act* permits an appellate court hearing an appeal from a jury's award for damages for personal injury to substitute its own assessment of damages.

⁹ Section 18 (1), *Federal Court Act*. See section 28(1) for the list of Acts giving the Federal Court of Appeal jurisdiction with regards to the boards, commissions or other tribunals they create. Section 18.5, *Federal Court Act*, R.S.C. 1985, c. F-7.

¹⁰ Section 27 (1.1)(a), *Federal Court Act*.

¹¹ *Universal Workers Union v. Ferreira*, 2009 ONCA 155, para. 29 per Gillese J.A.

¹² *MacDougall v. MacDougall*, 2005 CanLII 44676 (ON C.A.) at para. 25. per Lang J.A.

¹³ *H.L. v. Canada (Attorney General)*, 2005 SCC 25 (CanLII), [2005] 1 SCR 401 at para. 74-75 per Fish J.

¹⁴ Paul M. Perell, “The Standard of Appellate Review and the Ironies of *Housen v. Nikolaisen*”, (2004) 42 *Adv. Q.* 40 at 41. *Housen v. Nikolaisen*, [2002] 2 SCR 235, 2002 SCC 33

¹⁵ *Keljanovic Estate v. Sanseverino* (2000), 186 DLR (4th) 481 at paras. 26-30 (Ont. C.A.) *leave to appeal refused* [2000] S.C.C.A. No. 300.

¹⁶ *L. (H.) v. Canada (AG)*, [2005] 1 SCR 401 at paras. 55 and 110; and at para. 58 quoting *Assicurazioni Generali SpA v. Arab Insurance Group*, [2003] 1 WLR 577 at para. 197 (UKCA).

¹⁷ *Housen v. Nikolaisen*, [2002] 2 SCR 235 at para. 5.

¹⁸ *L. (H.) v. Canada (Attorney General)*, at para. 69.

¹⁹ *Cruz v. Robins*, 2008 ONCA 53 at para. 13.

²⁰ Paul M. Perell, supra., at p. 49 referring to . *Housen v. Nikolaisen*, supra. at para. 10-18

²¹ *Waxman*, at para. 315. *Huisman v. MacDonald* (2007), 224 OAC 176 at para. 56 (C.A.).

²² *L. (H.)*, at para. 56.

²³ *Housen*, at para. 23. and see, *3com Corporation v. Zorin International Corp* (2006), 211 OAC 222 at para. 55 (C.A.).

²⁴ *Housen*, at para. 22, 103

²⁵ *L. (H.)*, at paras. 55-56.

²⁶ *Keljanovic Estate v. Sanseverino* (2000) 186 DLR (4th) 481 at para. 30 (Ont. C.A.); *K.(K.) v. K. (W.G.)* at para. 88.

²⁷ *Waxman v. Waxman* (2004), 186 OAC 201 at para. 335 (C.A.).

²⁸ *Waxman*, at paras. 282 and 343. See also, *Keljanovic Estate v. Sanseverino* (2000), 186 DLR (4th) 481 (Ont. C.A.); *Waxman v. Waxman* (2004), 186 OAC 201 (C.A.); *Mercier v. Royal & SunAlliance Insurance Co. of Canada* (2004), 72 OR (3d) 94 (C.A.); *3Com Corp. v. Zorin International Corp.* (2006), 211 OAC (CA); *Canadian National Railway v. Royal & SunAlliance Insurance Co. of Canada* (2007), 85 OR (3d) 186 (C.A.); *K.(K.) v. G. (K.W.)* (2008), 90 OR (3D) 481 (C.A.).

²⁹ *Waxman*, at para. 344.

³⁰ *Waxman*, at paras. 348-349.

³¹ *K. (K.) v. K. (W.G.)* at para. 88. Perell, supra. at p. 69 referring to *Housen*, supra., at paras. 19-25

³² *Housen v. Nikolaisen*, supra. at para. 8.

³³ *Ivaco Inc., Re*, 2006 CanLII 34551 (ONCA) at para. 71; *Friends of the Oldman River Society v. Canada*, 1992 CanLII 110 (S.C.C.), [1992] 1 SCR 3 at 76-77; *Schreiber v. Federal Republic of Germany*, 2001 CanLII 20859 (ON C.A.) at para. 20.

³⁴ *Housen v. Nikolaisen*, supra at para. 26.

³⁵ *MacDougall v. MacDougall*, 2005 CanLII 44676 (ON C.A.) at para. 33. per Lang J.A.

³⁶ *Housen v. Nikolaisen*, supra at para. 28.

³⁷ *Housen v. Nikolaisen*, supra at para. 31.

³⁸ *MacDougall v. MacDougall*, 2005 CanLII 44676 (ON C.A.) at para. 25. per Lang J.A.

³⁹ *Housen v. Nikolaisen*, supra at para. 36.

⁴⁰ *Brady v. Lamb* (2005) 78 OR(3d) 680 at paras. 8-12 (C.A.).

⁴¹ *Brady v. Lamb*, supra., at para. 8 (C.A.) citing *Hunt v. Sutton Group Incentive Realty Inc.* (2002), 60 OR (3d) 665 at para. 52 (C.A.).

⁴² *Brady*, at paras. 8-12.

⁴³ *Kerr v. Loblaw Inc.*, 2007 ONCA 371 at para. 33.

⁴⁴ *Mizzi v. Hopkins* (2003), 64 OR (3d) 365 at para. 53 (C.A.).

⁴⁵ *Marshall v. Watson Wyatt & Co.* (2002), 57 OR (3d) 813 at para. 15 (C.A.); *Kerr v. Loblaw Inc.*, 2007 ONCA 371 at para. 32.

⁴⁶ *Waxman*, at para. 305.

⁴⁷ *Housen v. Nikolaisen*, supra. at para. 30; *McKinley v. BC Tel*, [2001] 2 SCR 161 at para. 59 quoting *Vancouver-Fraser Park Dist*, [1975] 2 SCR 1085; *McLean v. McCannell*, [1937] SCR 341.

⁴⁸ *McKinley*, at para. 60; *Marshall*, at para. 12; see, *Kerr v. Loblaw Inc.*, 2007 ONCA 371 at para. 53. Section 119 of the *Courts of Justice Act* permits an appellate court hearing an appeal from a jury's award for damages for personal injury to substitute its own assessment of damages.

⁴⁹ *Carwardine (Litigation Guardian of) v. 511825 Ontario Inc.*, 171 OAC 119 at para. 45 (C.A.).

⁵⁰ *Carwardine*, supra.

⁵¹ *Carwardine*, supra. at para. 46

⁵² Argument may be assisted by the following: Hon. John I. Laskin, *What persuades (or, What's going on inside the judge's mind)*, Adv. Soc. J. June 2005, p.4; I. Ellyn & M. Gordon, *Winning Business Appeals and the Concept of “Commercial Reasonableness*, OBA YLD, Your 1st Civil Appeal , May 7, 2007: www.ellynlaw.com/PDFs/BarExl_WinningAppeals.pdf.